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No. 02-274

IN THE SUPREME COURT OF THE UNITED STATES

LAURIE A. WHITE, INDEPENDENT COUNSEL,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

and

LEN DAVIS

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING PETITION FOR WRIT OF CERTIORARI SUBMITTED BY LAURIE A. WHITE, INDEPENDENT COUNSEL

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The National Association of Criminal Defense Lawyers (NACDL) respectfully moves this Honorable Court pursuant to United States Supreme Court Rule 37 for leave to file the accompanying brief *amicus curiae* in support of Petitioner, Appointed Independent Counsel. This motion is necessary because, although the Solicitor General and Independent Counsel have consented in writing to the filing of this brief, standby counsel for Mr. Len Davis has not responded to NACDL's attempts to obtain Mr. Davis' consent.

In support, NACDL states:

1. NACDL is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

2. In this case, the defendant has chosen, pursuant to

Faretta v. California, 422 U.S. 806 (1975), to represent himself during the Federal Death Penalty Act (FDPA) sentencing hearing. *See* 18 U.S.C. § 3591 *et seq.* Further, the defendant has stated that he will not introduce mitigation evidence and that he affirmatively seeks a death verdict at the trial court level.

3. The appointment of an independent counsel to present mitigation evidence in these circumstances implicates both the Sixth Amendment rights of criminal defendants as and the public's interest in the fair, efficient, and consistent administration of the federal capital punishment system in accord with the Eighth Amendment.

4. Moreover, the defendant in this case, Len Davis, actively seeks a sentence of death from the district court and therefore he joins the United States in opposing the district court's order appointing independent counsel. Therefore, the normal mechanism by which the defense perspective is

presented to this Court in a criminal case does not exist. In addition, NACDL participated below by filing a brief *amicus curiae* in the Fifth Circuit which was quoted by the dissent.

5. NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. NACDL is dedicated to the preservation and improvement of our adversary system of justice. Thus, the members of NACDL have a vital interest in ensuring that the integrity of the criminal justice system is protected.

6. The United States, through the Office of the Solicitor General and Appointed Independent Counsel Laurie White have indicated that they do not oppose NACDL's filing of an *amicus curiae* brief in this case. NACDL has contacted standby counsel for Len Davis but has received no response as yet.

We ask leave to file our *amicus curiae* brief in the belief that it may assist the Court.

Respectfully Submitted,

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THIS IS A CAPITAL CASE

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING PETITION

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation which currently has a membership exceeding 10,000 attorneys with an additional 28,000 affiliate members in fifty states.[1] The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the House of Delegates. NACDL was founded forty years ago to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. A

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[1] Pursuant to S.Ct. Rule 37.6, counsel certifies that no counsel for party authored any part of this brief. No person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief.

Pursuant to S.Ct. Rule 29.6 on Corporate Disclosure Statements, NACDL is a nonprofit corporation. It has no parent corporation, and it is not a publicly held corporation, nor does a publicly held company own 10% or more of its stock.

cornerstone of this organization's objectives is the preservation of defendants' fundamental constitutional right to counsel as provided by the Sixth Amendment. Similarly, NACDL has strong interests in the vindication of the Eighth Amendment's ban on cruel and unusual punishment. NACDL is concerned about any case that impacts these constitutional rights. NACDL believes that the issues discussed in this case are of such profound importance to criminal defendants, defense lawyers and the administration of criminal justice throughout the nation that NACDL should offer its assistance to the Court.

SUMMARY OF ARGUMENT

The issue in this case is whether, in the circumstances present here, the district court's appointment of an independent counsel to present mitigation evidence and challenge the government's aggravating circumstances during capital sentencing proceedings unconstitutionally interferes with a criminal defendant's right to represent himself. Both parties in this case seek the same outcome from the district court -- a sentence of death. Accordingly, at the district court level, there is a breakdown in the adversary process. This breakdown occurs in the context of a capital sentencing

proceeding, where the Eighth Amendment requires both consistency and a heightened degree of accuracy, and where the specific statutory procedures of the Federal Death Penalty Act (FDPA) apply. Although very concerned with any course that might undermine a defendant's fundamental constitutional right of self-representation, given this narrow and unique combination of circumstances, NACDL believes that as long as Mr. Davis is given full control over his case, the district court's appointment of an independent counsel to present mitigation evidence and challenge aggravating evidence does not infringe on his *Faretta* rights.

ARGUMENT

Unquestionably, a criminal defendant has the fundamental constitutional right to represent himself. *See Faretta v. California*, 422 U.S. 806 (1975). The Fifth Circuit's opinion in this case correctly recognizes this right,[2] but fails to similarly recognize the

[2]It appears that in this case the district court intends to fully honor that right as well. "This Court . . . will . . . allow Davis full rein in his penalty phase. He may voir dire jurors, make an opening statement, question witnesses, call witnesses, introduce evidence, make objections and present a closing argument, all as he desires to do nor not do . . .". Order at 6.

Eighth Amendment's ban on the arbitrary and capricious imposition of the death penalty. As Judge Dennis states in dissent,

> As constitutional scholars have observed, "Whenever possible, conflicting [constitutional] provisions should be reconciled and construed so as to give effect to both." The Supreme Court has consistently refused to assign priority among the safeguards enumerated in the Bill of Rights. This case presents a conflict between self-representation and Eighth Amendment interests. The district court's reconciliation of these constitutionally protected interests is manifestly reasonable--so much so that it calls to mind Justice Clark's admonition that "there is no war between the Constitution and common sense."

285 F.3d at 392-93 (citations omitted).

Petitioner's decision to actively seek a death verdict at the district court level creates a breakdown in the adversary process.[3] In the unique context of a capital sentencing hearing, this breakdown in the adversary system creates the risk that the death penalty will be imposed in an unconstitutionally arbitrary and capricious manner.

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[3] *See infra* n.5.

I. The possibility of death implicates Eighth Amendment concerns which create a special need for accuracy and consistency.

There is no question but that "death is different." *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991). As a penalty, death is unique in its severity and irrevocability. *Furman v. Georgia*, 408 U.S. 238, 286-291 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring). As this Court succinctly stated in *Woodson v. North Carolina*, 428 U.S. 280 (1976):

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of a only a year or two.

Id. at 305.

Because "death is different," the Eighth Amendment requires that the procedures used for determining whether death is an appropriate punishment be especially reliable so that death is not imposed "in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 313 (1972). "Because of th[e] qualitative difference [between the death penalty and a life sentence], there is a corresponding difference

in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305. Thus, in *Gregg*, the Court held that,

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Id. at 189.

The Fifth Circuit Opinion incorrectly ignores entirely the Eighth Amendment concerns present in the context of this case. The Fifth Circuit observes

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *422 U.S. at 834* (quoting *Illinois v. Allen, 397 U.S. 337, 350-51, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970)* (Brennan, J., concurring)).

285 F.3d at 384.

Unfortunately, this observation ignores the difference

between the sentencing phase of a capital case on the one hand, and either the trial of a non-capital case or the culpability phase of a capital trial. At the trial of a non-capital case or the culpability phase of a capital trial a defendant may choose to plead guilty to the charge. A defendant may not, however, "plead guilty" to the death penalty.[4] This distinction is based upon Eighth Amendment concerns and society's interest in the accurate and fair imposition of the death penalty. As Judge Dennis noted:

> In the words of Justice Thurgood Marshall, "[a] defendant's voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice." *Whitmore v. Arkansas, 495 U.S. 149, 173, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990)* (Marshall, J., dissenting). Consequently, cases such as the one before us do not involve a capital defendant's so-called "right to die." When a capital defendant seeks to circumvent procedures necessary to ensure the propriety of his conviction and sentence, he does not ask the State to permit him to take his own life. Rather, he invites the State to violate two of the most basic norms of a civilized society--that the State's penal authority be invoked only where necessary to serve the ends of justice, not the ends of a particular

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[4] The FDPA requires a special hearing to determine whether a sentence of death is justified, and this hearing cannot be waived by the defendant. *See* 18 U.S.C. § 3593; *see also infra* Section III

> individual, and that punishment be imposed only where the State has adequate assurance that the punishment is justified. The Constitution forbids the State to accept that invitation.

285 F.3d at 397.

Therefore, in the sentencing phase of a capital trial it is simply not true that the defendant is the only one who bears the consequences of the outcome, as postulated by *Faretta*. If that were true, then the defendant would be able to "plead guilty" to the death penalty. However, a defendant may not "plead guilty" to the death penalty because Eighth Amendment considerations mean that the entire society has a strong interest in ensuring that this most severe and permanent form of punishment is imposed in a fair, accurate, reliable and consistent manner.

For a just system of punishment, the procedures used must promise both accuracy within cases and consistency among cases. First, justice demands that the sentence imposed in the individual case be arrived at in a manner that assures its correctness. Thus, the Court has required that the procedures used to impose capital punishment "ensure 'reliability in the determination that death is the

appropriate punishment in a specific case . . ." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (quoting *Woodson*, 428 U.S. at 305). Second, for both public confidence in the system and in fairness to the class of defendants facing this extreme punishment, the procedures utilized must also achieve consistency across the spectrum of cases. "[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Gregg*, 428 U.S. at 188 (citing *Furman*, 408 U.S. at 309-10). Thus, the Court has insisted that "that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings*, 455 U.S. at 112.

II. An essential component of the Eighth Amendment's bar on cruel and unusual punishment is the jury's consideration of a life sentence.

In capital sentencing proceedings, a reliable determination of sentence depends upon the jury's ability to fairly consider the possibility of life. For this reason, this Court's Eighth Amendment jurisprudence has focused on the presentation of mitigating evidence in order to insure that the jury adequately considers a sentence of life.

Thus, the Court has said that the jury must "consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime." *Penry*, 492 U.S. at 328. As this Court stated in *Eddings*, 455 U.S. at 112, this requirement is an obvious corollary to the concern that there be a just consistency among cases: "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." In *Gregg*, the Court stressed the traditional importance of this feature in any sentencing scheme:

> It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'

Id. at 188 (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) (other citations omitted) . Again in *Woodson*, this Court emphasized the importance of this traditional requirement, particularly in a capital case:

> This Court has previously recognized that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and there be taken into account the circumstances of the offense together with the character and propensities of the offender." Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence . . . "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . *requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.*"

428 U.S. at 304 (emphasis added). Thus, the consideration of mitigating evidence is not an end in itself. It is the mechanism that insures that the jury adequately considers a life sentence, so that the death penalty is not imposed in an arbitrary or capricious manner.

III. Consideration of mitigating evidence through the adversary system is an essential component of the mechanism by which the FDPA satisfies the Eighth Amendment's mandate that the sentencer fairly adequately consider life.

The Federal Death Penalty Act sets forth specific procedures for realizing the substantive constitutional aim that a life sentence be considered. These procedures include the requirement of a "special

hearing to determine whether a sentence of death is justified." 18 U.S.C. § 3593. At this "special hearing," consistent with the dictates of the Supreme Court, the jury must be permitted to consider any mitigating circumstance. Notably, this "special hearing" is mandatory and cannot be waived:

> If the attorney for the government has filed a notice [seeking the death penalty] as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense describe in section 3591, the judge . . . *shall* conduct a separate sentencing hearing to determine the punishment to be imposed.

18 U.S.C. § 3593 (b) (emphasis added). Therefore, a defendant who has been found guilty in a capital case may not "plead guilty" to the death penalty. Further, the FDPA sentencing scheme clearly contemplates that the manner in which the mandatory procedures will occur is through the consideration of mitigating evidence via the adversary system. Under normal circumstances, then, the defendant presents the mitigating circumstances which allows the decision-maker to consider a life sentence. Thus, under the FDPA, consideration of mitigating evidence through the adversary process is crucial to the overall goal that capital sentencing not occur in an

arbitrary and capricious manner.

Indeed, the adversary process is deeply ingrained in our justice system as a requirement for fair verdicts. As the Supreme Court has explained:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts within the framework of the rules of evidence.

United States v. Nixon, 418 U.S. 683, 709 (1974). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975).[5]

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[5] *See also Carroll v. President and Commissioner of Princess Anne*, 393 U.S. 175, 183 (1968) (criticizing one-sided proceedings because "the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding . . ."). Indeed, the judicial system's need for adversaries is deemed so crucial to the attainment of accurate and just results that, in the absence of true adversaries, the federal courts will not hear a case. *See United States Parole Commission v. Geraghty*, 445 U.S. 388, 395-96 (quoting *Flast v.*

In fact, in *Gardner v. Florida*, 430 U.S. 349 (1976), the Supreme Court reversed a death sentence that was imposed on the basis of one-sided information that had not been subjected to debate through the adversarial process. Thus, the Court held:

> [T]he argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief [is] that debate between adversaries is often essential to the truth-seeking function of trials[.]

Gardner, 430 U.S. at 360.

IV. The adversary system disintegrates when neither party advocates for life.

In this case, Petitioner's decision to actively seek a death verdict at the trial level causes the adversary system to disintegrate.[6]

Cohen, 392 U.S. 83, 95 (1968) (Article III of the Constitution limits the business of federal courts to 'questions presented in an adversary context . . ."); *Dailey and Collie v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998) ("federal courts may only address questions presented in an adversary context . . .").

[6] The Fifth Circuit Opinion incorrectly suggests the trial court cannot appoint independent counsel because Davis has made a "strategic" decision simply to attack the strength of the government's case as to his guilt. *See* 285 F.3d at 384-85 & n.6 and accompanying text. This suggests that Mr. Davis has a "strategy" on how to make the case for life sentence before the trial jury. The district court, however, found that Mr. Davis actively seeks a death verdict at the trial level and the Fifth Circuit concedes that there is evidence in the record that supports this finding. *Id.* Moreover, as Judge Dennis notes, in Mr. Davis' original brief in the Fifth Circuit he states,

Neither party will contest aggravating circumstances.[7] Neither party will present or identify mitigating circumstances.[8] And neither party

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> Mr. Davis believes that the[] legal issues [he plans to raise in a motion fo new trial and/or Rule 2255 motion] will of necessity have to be viewed much more closely by the district and appellate courts if he is facing a death sentence, than they would if he were facing a life sentence. While he has no desire to die he has weighed carefully the prospects of a death sentence against spending the rest of his his life in jail - and he finds life in prison to be more onerous. Believing that legal errors that led to his conviction will be examined more scrupulously if he has a death sentence facing him, Mr. Davis made the strategic decision that he does not want to put on mitigating evidence in an effort to convince the jury that he should not die . . .

285 F.3d at 389 n.23 (Dennis, J. dissenting). Thus, it is clear that Mr. Davis does not intend to present any case for life to the sentencing jury and actively seeks a death verdict from that body. Accordingly, the Fifth Circuit's reliance on "trial strategy" as a justification for overruling the district court is unfounded.

[7] *Cf. Bell v. Cone*, __ U.S. __, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (noting the difference in kind rather than degree where the defense "entirely fails to subject the prosecution's case to meaningful adversarial testing" rather than failing to "do so at specific points.") When, as here, the adversarial system fails entirely, the judiciary can have no faith in the outcome. This is not, as discussed below, a case where the defense has "strategically" chosen to contest specific points in the prosecution's case, but rather one in which the adversarial process "entirely fails."

[8] The opinion below incorrectly asserts that the district court "wants the jury to have a complete picture of all possible traditional mitigating factors." Opinion at 384. The district court simply appointed independent counsel to insure that the existence of mitigating evidence is investigated, that its presentation to the jury is effectively contemplated, and that the case for life be presented.

will ask the jury to consider a sentence of life.[9]

The district court judge, Judge Dennis, and Independent Counsel cite an impressive body of case law establishing a federal court's authority to appoint amicus counsel to preserve the adversarial nature of the proceedings. *See* 285 F.3d at 394-95 & n. 52 (citing *United States v. Davis II*, 180 F. Supp. at 799) (other citations omitted); *Independent Counsel's Petition For Writ of Certiorari*, Section I.B. at 13-17. Indeed, as Judge Dennis states, this Court appears to have explicitly recognized this authority by stating in *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.7 (1984), "A pro se defendant must generally accept any unsolicited help or hindrance that may come from . . . an amicus counsel appointed to assist the court." Similarly, *Faretta* itself appears to leave open the possibility of the appointment of an amicus counsel. *See Faretta*, 422 U.S. at 846 n.7 (Burger, C.J., dissenting) ("Some of the damage we can anticipate from a defendant's ill-advised insistence on conducting his own defense may be mitigated by appointing a qualified lawyer to sit

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[9] For this reason, it makes no difference *why* Mr. Davis joins the government in seeking a death verdict. All that matters is that there is no one asking the jury to consider life.

in the case as the traditional 'friend of the court.' The Court does not foreclose this option.")

The Fifth Circuit's opinion unpersuasively attempts to dismiss all of this authority in three short sentences.[10] The Fifth Circuit's opinion does not explain precisely why this authority is not "remotely analogous" and "of limited precedential value." As Judge Dennis adroitly points out, the lack of case law in the specific circumstances of the penalty phase of a federal directly trial is not surprising given that prior to 2001 the federal government had not executed a civilian since 1963. Accordingly, any decision will necessarily have to rely on authority based upon differing factual scenarios. Moreover, as Judge Dennis also explains, *see* 285 F.3d at 394, because of separation of powers concerns, the opinion's reliance on cases where the appointment of a special prosecutor was rejected is much further afield than the cases supporting a federal court's authority to appoint amicus counsel.

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[10] 285 F.3d at 382 ("We closely scrutinized the "amicus curiae" cases. None are remotely analogous to the situation in the instant case. Therefore, we deem these cases to be of limited precedential value.")

In this regard, the Fifth Circuit's opinion is even more curious given that it also completely ignores the substantial state court authority supporting the appointment of an independent counsel in similar, if not identical circumstances. *See* 285 F.3d at 395-96 (Dennis, J. dissenting) (citing *Muhammed v. State*, 782 So.2d 343 (Fla. 2001); *State v. Koedatich*, 548 A.2d 939, 992 (N.J. 1988), *Morrison v. State*, 373 S.E.2d 506, 509 (Ga. 1988), *Klokoc v. State*, 589 So.2d 219 (Fla. 1991)).

Without appointed counsel, the jury is left with no guidance on how and in what manner, if at all, to consider life. This is distinctly different from a situation where the defendant wants the jury to consider life, but for strategic reasons, chooses not to present mitigating evidence.[11] In that situation, the jury still has a mechanism

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[11] The Courts have repeatedly recognized that,"[w]here counsel has neglected to conduct a proper investigation into mitigating circumstances, the failure to introduce mitigating evidence cannot be attributed to strategy." *People v. Ruiz*, 686 N.E.2d 574, 582 (Ill. 1997) (citing *People v. Coleman*, 660 N.E.2d 919 (Ill. 1995); *Baxter v. Thomas*, 45 F.3d 1501, 1514 (11th Cir. 1995) (a "strategic" decision cannot be reasonable when counsel has failed to investigate his options and make a reasonable choice between them). *See also Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991)("Case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."), *cert. denied*, 503 U.S. 952 (1992).

whereby life can be considered.[12] Moreover, because there is no one to investigate, and if appropriate, challenge the government's aggravating circumstances, there is no meaningful way for the jury to assess the validity and significance of the government's case.

Mr. Davis has the absolute right to represent himself and pursue whatever course he deems appropriate. That is his right under *Faretta*. Mr. Davis' apparent decision to join the government in seeking a death verdict, however, creates the risk that the death penalty will be imposed outside constitutional and statutory bounds; i.e. it will be imposed arbitrarily and unreliably because the jury will have no way to fairly consider a life sentence. In these unique circumstances, as long as Mr. Davis is given full control over his case, the district court's appointment of independent counsel to present mitigating evidence does not infringe on his *Faretta* rights.

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[12] It also must be noted that Mr. Davis's strategy – to be sentenced to death in order to increase the scrutiny of his appeal on the merits of the liability phase – is not one that would be recognized as valid if proffered by an attorney. Indeed, it would constitute ineffective assistance. Thus, the deliberate sabotage of his penalty phase defense, in a manner that would not be countenanced if performed by an attorney, places Mr. Davis's case in a vastly different context than other situations in which defendants exercise their constitutional right to proceed *pro se*.

CONCLUSION

Although ultimately Mr. Davis may not want to die, nevertheless, for whatever reason, the fact of the matter is that he presently wants the trial jury to impose the death penalty. Accordingly, at the district court level, there are not two adversaries arguing for different outcomes. Under these rare and unique circumstances, the district court indeed possesses the discretion to appoint *amicus* counsel to present mitigating factors to the jury so that the truth-seeking function of the adversary process is not circumvented and to assure that the death penalty is considered only where a life sentence is also fairly considered. Accordingly, the district court's order appointing *amicus* counsel should be affirmed.

Respectfully submitted,

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